

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. See generally the enclosed copy of 86 Ill. Adm. Code 130.605. (This is a GIL).

April 23, 1999

Dear Mr. Xxxxx:

This letter is in response to your letter dated February 4, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

We are writing on behalf of our corporate clients who have elected for federal income tax purposes to be taxed as an 'S' corporation. In connection with such an election in several instances a separate QSSS election has been made to treat a subsidiary as liquidated into the parent and therefore treated as a division if you will, for federal income tax purposes.

Finally some of the S corporations are 100% owned by an employee such ownership plan (ESOP).

Based upon the facts as set forth above, we are requesting your opinion as to how your state would apply income, sales/use, or UBIT taxes in the following scenarios.

Situation I

'S' corporation is owned 100% by an ESOP. Under present federal law, all of the income or loss of the S Corporation will flow through to the ESOP. Again, under present law such income will not be subject to the unrelated business income tax or UBIT.

Situation II

Some facts as in I above but in addition the S Corporation has made a QSSS election for its 100% owned subsidiary. Does this change your answer?

Nexus Issues Resulting from QSSS Election

Sales/Use Tax

What is the impact of the QSS election for sales/use tax nexus? For example, if the parent above does not have nexus does the QSSS

election for the subsidiary (assuming it has nexus) result in nexus for both or does the fact that they are still separate legal entities control.

Similarly, if the parent has nexus will you require the subsidiaries sales to be subject to the appropriate sales/use taxes.

Income Tax

For an S Corporation subject to income/franchise taxes, would your state impute the nexus of one to the other such that the total income would be subject to apportionment?

Your prompt response to these questions would be greatly appreciated.

The Income Tax Division of our office has forwarded a copy of your letter for a response regarding any sales tax questions contained in your letter.

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a corporation would be considered "an Illinois retailer" subject to Retailers' Occupation Tax liability or "a retailer maintaining a place of business in Illinois" subject to Use Tax collection duties from their Illinois customers.

Assuming a delivery in Illinois, an Illinois retailer is anyone who either accepts purchase orders in Illinois or who sells items of tangible personal property which are located in Illinois at the time of sale. See the enclosed copy of 86 Ill. Adm. Code 130.605(a).

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see subsection (i) of the enclosed copy of 86 Ill. Adm. Code 150.201), must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See subsection (c) of the enclosed copy of 86 Ill. Adm. Code 150.801. Please note that out-of-State sellers with any kind of representative in Illinois (not just sales or lease agents) are required to register as out-of-State Use Tax collectors.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it

also includes the presence of any agent or representative of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

Please note that persons engaged in making retail sales in Illinois must register and obtain a Certificate of Registration from the Department in order to lawfully sell tangible personal property at retail in this State. See the enclosed copy of 86 Ill. Code 130.701. A "person" is defined in Section 1 of the Retailers' Occupation Act (35 ILCS 120/1) as "[a]ny natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, limited liability company, or a receiver, executor, trustee, guardian or other representative appointed by order of any court." Therefore a corporation (whether subchapter S or not) making retail sales subject to the Retailers' Occupation Tax Act or Use Tax Act must register and file returns.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk
Enc.